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**Montana Legislative
Services Division
Legal Services Office**

PO BOX 201706
Helena, Montana 59620-1706
(406) 444-3064
FAX (406) 444-3036

MONTANA LAW GOVERNING GOVERNMENT CONTRACTS FOR SERVICES

Prepared for the State Administration, Public Retirement, and
Veterans' Affairs Interim Committee

by John MacMaster, Staff Attorney

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Introduction

This report is intended to give the Committee a brief description of the statutes (and the limited number of administrative rules and Montana Supreme Court cases) containing the legal principles that generally govern state government contracts for services. The emphasis is on the general process by which services are procured by contract. The report is not intended to be an all-encompassing review of all statutes relating in any way to procurement in general or procurement of specific types of services. Hopefully, by knowing what the basic Montana law contains, the Committee can better consider what the law should and should not contain and what the overall policies governing state government contracts for the procurement of services should address.

Definition of a contract

There are many types of contracts and many definitions of the word "contract" and of the different types of contracts. For purposes of a government contract for services, a contract

is a written agreement, enforceable by law, between a particular government agency and a private party (a person, business, nonprofit entity, or other entity), in which each party promises to do something for or give something to the other party. In the vast majority of government contracts for services, the government promises to pay the other party in exchange for services rendered by the other party. The two parties must freely and mutually consent to the terms of the contract and must understand those terms. The consent to the agreed-upon contract terms must be communicated to each other. The nongovernment party must be an adult (if a natural person) of sound mind. The contract may not be for a purpose or objective made illegal by law. A full statement and explanation of the principles of contract law would fill a volume. For example, consent to the contract must be freely given. Under section 28-2-401, MCA, consent is not free or real if it is obtained through duress, menace, fraud, undue influence, or mistake. The meaning of those terms and what each does and does not cover would take pages of explanation. See Title 28, Chapters 2 and 3, MCA, which are a total of 33 pages in length, for a brief statement of Montana statutory law principles governing contracts.

Outline of basics of government services contract law

The following is a brief outline of Montana law governing government contracts for services. The statutes, which are in Title 18 of the MCA, do not provide a complete and overall set of laws relating to all aspects of a contract. In addition, many of the statutes cover all government contracts, not just contracts for services. Some of the statutes cover only contracts for services. Others cover contracts other than contracts for services. To the extent that Title 18 does not address aspects of a government contract, Title 28, relating to contracts in general, and the voluminous contract law principles contained in the case law apply. Title 28 and the case law are what private parties rely on to govern contracts between themselves.

Security covering performance

A state agency may require a bidder to provide the state with security to cover failure of a bidder to enter into a contract if the bidder's bid is accepted (18-1-201(2) and 18-4-312, MCA).

A state agency may require a services provider to give a bond or deposit securities to ensure performance of the contract and payment of laborers, subcontractors, and suppliers of materials (18-4-312, MCA).

Bids and proposals

An invitation for bids or a request for proposals must be issued for a contract for services. Bids must be opened publicly. Information relating to each bid must be recorded. There are statutory criteria for the evaluation of bids and for changes in bids due to mistakes. A bidder

contract is to be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids (18-4-303, MCA).

Responses to a request for proposals are public documents open to public inspection after the proposals have been opened at the time and place designated in the request for proposals, subject to the limitations of: (1) the Uniform Trade Secrets Act; (2) matters involving individual safety as determined by the Department of Administration; (3) information requested by the department to establish vendor responsibility, unless prior written consent has been given by the vendor; and (4) other constitutional protections (18-4-303 and 18-4-304, MCA). State government documents in general are open to inspection under 2-6-102, MCA. In *Great Falls Tribune Co., Inc. v. Day*, 289 Mont. 155, 55 St. Rep. 524 (1998), the Montana Supreme Court held that the state constitutional right to inspect public documents included the right to inspect bidders' proposals prior to the execution of a contract and that although the right to privacy may, in a proper case, be grounds for denial of precontract inspection of a proposal, economic advantage to the state is not.

Exceptions to normal bid or proposal process

If the immediate delivery of services is required by public exigencies, the services may be procured in the same manner as they are procured by private persons, instead of as required by the state contracts statutes, which require, among other things, procurement by a bidding process (18-4-133, MCA).

A contract for services not exceeding the amount established by rule of the Department of Administration may be made by small purchase or limited solicitation procedures established by the department (18-4-305, MCA). Under ARM (Administrative Rules of Montana) 2.5.603, the amount is \$5,000 for small purchases and \$5,001 to \$15,000 for limited solicitation procedures.

If there's only one source for the services, a contract may be awarded without competition (18-4-306, MCA).

Department of Administration oversight of procurement

The department procures or supervises the procurement of all services, but may delegate the power to procure services to other state agencies (18-4-221 and 18-4-222, MCA).

The department may, in its discretion, permit or require the inclusion of contract clauses providing for adjustments in prices, time of performance, or other appropriate contract provisions relating to the following subjects:

- the unilateral right of the state to order, in writing, changes in the work within the scope of the contract and temporary work stoppage or delay of performance;
- variations occurring between estimated quantities of work under a contract and actual quantities.

The department may also, in its discretion, permit or require the inclusion in state contracts of clauses providing for appropriate remedies and relating to the following subjects:

- liquidated damages, as appropriate;
- specified excuses for delay or nonperformance;
- termination of the contract for default;
- termination of the contract, in whole or in part, for the convenience of the state (18-4-224, MCA).

The department has authority to adopt rules governing the preparation and content of specifications for services procured by service contracts (18-4-232, MCA). These rules (and other department rules relating to state procurement and contracts) are contained in Title 2, chapter 5, parts 2 through 6, of the Administrative Rules of Montana (ARM). These rules total 18 pages in length and implement various sections in Title 18, chapter 4, of the MCA. Most of the rules were adopted in 1983, with one each adopted in 1987, 1994, 1995, and 1997, and two adopted in 1986. The rules have been amended numerous times since the adoption of most of them in 1983. The last major set of amendments to the rules was in 1997, when most of the rules were amended.

Architectural, engineering, and land surveying services

The Department of Administration must choose the architect or consulting engineer for state building projects. An architect must be licensed in Montana. The architect's seal and signature must be on the plans and specifications (18-2-111 through 18-2-114, MCA).

There is a special procedure for the procurement of architectural, engineering, or land surveying services. The procedure is set forth in Title 18, chapter 8, part 2, MCA, which in part provides:

18-8-203. Public notice of agency requirements. Each agency shall publish in advance its requirement for professional services. The announcement must state concisely the general scope and nature of the project or work for which the services are required and the address of a representative of the agency who can provide further details. An agency may comply with this section by:

- (1) publishing an announcement on each occasion when professional services provided by a licensed professional are required by the agency; or
- (2) announcing generally to the public its projected requirement for any category or type of professional services.

18-8-204. Procedures for selection. (1) In the procurement of architectural, engineering, and land surveying services, the agency may encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and conduct discussions with one or more firms

regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services.

(2) (a) The agency shall then select, based on criteria established under agency procedures and guidelines and the law, the firm considered most qualified to provide the services required for the proposed project.

(b) The agency procedures and guidelines must be available to the public and include at a minimum the following criteria as they relate to each firm:

- (i) the qualifications of professional personnel to be assigned to the project;
- (ii) capability to meet time and project budget requirements;
- (iii) location;
- (iv) present and projected workloads;
- (v) related experience on similar projects; and
- (vi) recent and current work for the agency.

(c) The agency shall follow the minimum criteria of this part if no other agency procedures are specifically adopted.

18-8-205. Negotiation of contract for services. (1) The agency shall negotiate a contract with the most qualified firm for architectural, engineering, and land surveying services at a price which the agency determines to be fair and reasonable. In making its determination, the agency shall take into account the estimated value of the services to be rendered, as well as the scope, complexity, and professional nature thereof.

(2) If the agency is unable to negotiate a satisfactory contract with the firm selected at a price the agency determines to be fair and reasonable, negotiations with that firm must be formally terminated and the agency shall select other firms in accordance with 18-8-204 and continue as directed in this section until an agreement is reached or the process is terminated.

Court actions on a contract

The district courts of the state of Montana have exclusive original jurisdiction of claims and disputes arising out of the contract. A contractor must, before bringing an action, use any dispute resolution procedure provided by the contracting state agency (18-1-401 and 18-1-402, MCA).

The state is liable under the contract in the same manner and to the same extent as a private individual would be liable under similar circumstances, except that the state is not liable for punitive damages (18-1-404, MCA). The rules of practice and procedure before the district court are the same as those governing two private parties who contract (18-1-411, MCA). The Attorney General has full charge of litigating the state's case (18-1-413, MCA).

Miscellaneous provisions

Unless otherwise provided by law, a contract cannot be for a term longer than 7 years (18-4-313, MCA).

Cooperative pooled purchasing of services by two or more public procurement units is allowed (18-4-402, MCA).

A contractor may, at any time during the period of the contract, withdraw any or all of the money due the contractor under the contract, if the contractor has given security for the money withdrawn (18-1-301, MCA).

A contractor may not assign the contract or any interest of the contractor in the contract to another party without the express written approval of the state (18-4-141, MCA).

Summary

Montana law governing state government contracts for the procurement of services is not extensive. It is mainly contained in the statutes set forth in Title 18, chapters 1, 2, 4, and 8, of the MCA. Provisions addressing the contract itself, the elements of a contract, and what it should contain are few. Therefore, the general contract law contained in Title 28, MCA, and the Montana Supreme Court cases concerning contracts between two private parties must often be relied on. Whether or not this is a satisfactory situation should perhaps be studied by the Committee. There is nothing in the law addressing a procedure by which specific government employees with specific qualifications for doing so oversee such contracts and ensure that they are well-drafted, cover everything that needs to be covered in a contract, and are adhered to by the person or entity contracting with the state for services. This is also a matter that the Committee could study.

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